

NTSB Order No. EA-4272

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 8th day of November, 1994

DAVID R. HINSON,
Administrator,
Federal Aviation Administration,

Complainant,

v.

FORESTEEN G. CHERRY,

Respondent.

Docket SE-13279

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on December 8, 1993, following an evidentiary hearing.¹ The law judge dismissed an order of the Administrator that had alleged that respondent had violated 14 C.F.R. 91.13(a).² We grant the

¹The initial decision, an excerpt from the hearing transcript, is attached.

²§ 91.13(a) provides:

appeal in part.

Respondent was the pilot in command on a December 22, 1992 helicopter flight to Silverado Farms. Silverado Farms incorporated various horse boarding facilities (paddocks and stables),³ as well as a petting zoo and a western wear store. Respondent (and passengers) landed on an asphalt parking lot in the midst of these equestrian facilities. According to the eyewitness testimony of Mr. Russell Davis, the caretaker, nearby horses were spooked by the landing, and a number were injured, one seriously. See Tr. at 22-23 and Exhibit A-3 veterinary bill.

Respondent contends, in contrast, that she saw one horse injure itself on the paddock fence after she landed, and when it was being approached by Mr. Davis. Respondent and her husband (who testified consistently on all matters), stated that they had been invited by the owner of Silverado Farms to visit by helicopter any time, and to land where they had. They allegedly were never advised of the existence of horses at the location, and were unaware of any facilities there other than the petting zoo and western wear store.

Respondent and her passengers left the helicopter and went shopping at the western wear store. Respondent testified that she was told by various individuals not to worry about the horse and that it was not her problem. Tr. at 173-174. In contrast, (...continued)

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³Approximately 75 horses were at the facility.

Mr. Davis testified that he advised her of the horse injuries. He further testified that, although he did not direct that respondent stay to talk to the horses' owners (who had been called), he suggested that respondent might want to talk to them (and assumed she would stay to do so).

Sonya Welch, the owner of the most seriously injured horse, testified that she arrived just as respondent was preparing to depart (the blades were rotating, Tr. at 80). According to Ms. Welch, respondent did not stop to talk to her and Ms. Welch did not try to attract respondent's attention in the helicopter (proceeding immediately to examine her horse). When respondent took off in the helicopter, according to Mr. Davis, all the nearby horses were again spooked, and rushed madly around their pens (Tr. at 30), and Ms. Welch was only approximately 30 feet from the departing aircraft. Respondent disagreed, testifying that Ms. Welch was still in the car when she took off (id. at 175), and stated that, prior to takeoff, she specifically asked about the injured horse she had seen and was told it had been moved. Id. at 174.

The law judge, faced with these diametrically opposed versions of events, extensively discussed the reliability of the various witnesses' testimony. The law judge accepted respondent's un rebutted testimony that, as to the landing, she did not know of horses in the area until she was about 5 feet off the ground.⁴ The law judge also found it reasonable for

⁴This testimony is supported by other evidence in the record

respondent not to have expected any problem, for she could properly assume that the facility's owner would have advised her of any safety implications of her landing a helicopter at that location.⁵

When it came to the takeoff, the law judge initially appeared to reject respondent's testimony that the helicopter landing had not caused the injuries. Tr. at 207. However, his ultimate ruling in respondent's favor greatly relied on the conclusion that, if respondent had thought her landing had caused the horses to injure themselves, she would not have returned to land a second time. Tr. at 209. As to the potential harm to Ms. Welch from the helicopter taking off when she was in its immediate vicinity, the law judge appears to have accepted respondent's testimony that she did not see anyone nearby on the ground until after she had begun her takeoff and that, at that point, it was most prudent to continue that maneuver. Tr. at 210.

The law judge's finding that respondent made two visits to Silverado Farms misinterprets the evidence.⁶ There was only one

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that the fields are fairly well tree-covered. See Exhibit A-1 photo. The Administrator did not argue that she made an insufficient reconnaissance or that the landing area, had it been free of horses, was inappropriate.

⁵This is a reasonable assumption regardless of whether the owner had repeatedly invited respondent to fly the helicopter to Silverado Farms, as respondent claims, or whether he merely responded in the affirmative to respondent's suggestion -- an issue debated in the record.

⁶The Administrator contributed to the misunderstanding, and failed to correct it when he had the opportunity. See Tr. at 12.

takeoff and one landing. On appeal, the Administrator contends that, as a result of the law judge's error, he reached an erroneous conclusion (i.e., that respondent must not have known of any problem with the horses because, if she had, she would not have come back a second time). The Administrator argues, therefore, that the law judge's credibility findings in favor of respondent are tainted and unreliable. The Administrator also challenges the law judge's suggestion of bias on the part of the FAA inspector who investigated the matter. The Administrator believes that the weight of the evidence supports his version of events.

As a general rule, resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge. Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there. Nevertheless, there are cases where the law judge's analysis is flawed to the point of unreliability. See, e.g., Administrator v. Mims, NTSB Order EA-3284 (1991), aff'd Mims v. NTSB, ___F.2d___ (11th Cir. No. 91-1270, March 1, 1993) (Board reversal of ALJ credibility determination upheld, when Board found ALJ's acceptance of respondent's explanation "unconvincing"); Chirino v. NTSB, 849 F.2d 1525, 1532 (D.C. Cir. 1988) (Board serves as the ultimate finder of fact, even regarding credibility determinations); and Administrator v. Schmidt, et al, NTSB Order EA-4025 (1994) (distinctions between issues of credibility and weighing of evidence discussed). In this case, not only is the law judge's

decision fatally flawed by his analytical error, we cannot find that the weight of the evidence supports his findings.⁷

As indicated previously, we have no quarrel with the law judge's finding that respondent did not violate § 91.13(a) when she landed the aircraft at Silverado Farms. However, we find her later takeoff to be careless, and affirm the Administrator's order on that basis.

We start with the question of injury to the horses, as that issue affects respondent's later duty of care in making her decision to take off. Two questions were raised by the evidence: how many horses were injured; and were the injuries caused by the helicopter landing? Evidence indicates that four horses were injured. See Mr. Davis' and Ms. Welch's testimony (Tr. at 63 and 84). Respondent did not contradict this testimony. In fact, she acknowledged the injuries, noting only that she was not aware of injury to the three other horses until months later. Tr. at 183.

The unrebutted eyewitness testimony and circumstantial evidence also support a finding that the horses injured themselves when they were spooked by the helicopter landing, and not that the horses were fine until Mr. Davis arrived, and he spooked them.⁸

⁷We also cannot discern whether the law judge's belief that the Administrator had failed to offer any evidence regarding a large aspect of the complaint (the perceived second flight) colored his view as to the validity of the remainder of the Administrator's case.

⁸The law judge concluded (*id.* at 211) that "there is certainly not any evidence that would indicate that those injuries are related to this helicopter operation." It appears that he is speaking of the three other horses allegedly injured at the time of landing. In our view, this finding ignores the

Having found that the landing caused injury to nearby pastured horses, the question becomes whether respondent failed in her duty of care when she later took off, causing further commotion and the potential for additional injury and property damage. Part of the answer to this question depends on whether she knew or should have known that the horses had been injured and could be injured further by a takeoff. In our view, and despite her testimony to the contrary, the record supports a finding that she knew the helicopter had caused the injuries.

Respondent testified that, as she landed, she saw two horses running in a round corral.⁹ She stated that she had concern for their running, and that the noise might be disturbing them. Tr. at 172-173. Indeed, a bystander testified that a number of horses were running frantically around their pens even after the helicopter landed. Tr. at 70. Thus, regardless of any actual injury, respondent was or should have been on notice that, not only were horses in the area, but also that they could scare as a result of helicopter operations.¹⁰ Even if she saw only two

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evidence that the horses were uninjured the day before and were unused to aircraft landings nearby, ignores Mr. Davis' testimony that he saw one horse break through a fence while the helicopter was landing, and ignores other testimony detailing the exact injuries to all four horses. Tr. at 63, 84.

⁹Mr. Davis' testimony was that, at the time, the horses were not in the round corral. They were moved to an area near there after the landing, the broken fence, and the injuries. Tr. 24.

¹⁰There is no reason not to impute that fairly basic knowledge to respondent. Absent a sense of calm that is bred from familiarity, helicopters and horses understandably do not mix.

horses as she testified, at that point (especially given the incoming aerial and ground view of elaborate equestrian facilities), she was obligated to investigate the possibility that there were more horses in the area. There is no indication she did so.¹¹ Respondent's failure reflects a lack of judgment and care.¹²

Further, we have no skepticism regarding the veracity of Mr. Davis' testimony. Cf. initial decision at 208. Having found that the injuries were caused by the landing, we see no reason to reject Mr. Davis' testimony that he spoke of the matter with respondent. Such a discussion surely would be expected. We are also not surprised by his failure somehow to order respondent to stay to speak to the horses' owners, as he had no real authority or ability to compel her to remain at the scene. His testimony that he expected respondent would stay is eminently reasonable to us. Given her part in the injuries to the horses, it is far less believable that Mr. Davis would tell respondent that it was fine for her to leave, and cheerfully invite her to return, as respondent alleges.¹³

¹¹There is much in the record about respondent's lack of knowledge of Silverado Farms' facilities other than the store and the petting zoo. That explanation does not survive her landing at the site and its obvious use.

¹²As noted, respondent contended that she was told on two occasions not to worry about the horses. We cannot credit this testimony in the face of our finding that the landing injured them and the un rebutted evidence that they were not under control at the time of takeoff. Tr. at 30.

¹³The Administrator also alleges an unfair bias attributed to his inspector by the law judge. Respondent replies that the

Respondent resided only a few miles from Silverado Farms. It would not have been a great inconvenience to leave the helicopter where it was, pending assurance that a takeoff could be safely made. The most obvious reason for a quick departure after learning of the animal injuries would be to avoid confrontation and, possibly, responsibility.

In light of these conclusions, we have no need to resolve the conflicts in the testimony regarding whether Ms. Welch was walking 30 feet from the helicopter when it took off or was still in her truck at the time. Having found that respondent failed to exercise the necessary care in taking off from Silverado Farms that day, but that her landing actions were not shown to be careless or reckless, we must review the sanction. A suspension of 30 days (as opposed to the 90-day suspension proposed in the Administrator's complaint) is within the range of precedent. See Administrator v. Finnell, NTSB Order EA-4217 (1994); Administrator v. D'Attilio, NTSB Order EA-3738 (1992); and Administrator v. Spradlin, NTSB Order EA-3575 (1992).

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law judge was free to base credibility findings on the stake witnesses had in the outcome of the case. We agree only to a point. Every witness has a bias of some sort, some obvious, some exposed on the record, and some not. As we noted in Administrator v. Schmidt, et al., NTSB Order EA-4025 (1994) at footnote 4, "we cannot establish a mechanical standard under which the testimony of the least interested observer is automatically given the most weight regardless of its objective worth." In any case, here the law judge accepted the testimony of the most interested and potentially most biased party, respondent. Reviewing its "objective worth," we find that testimony unreliable.

ACCORDINGLY, IT IS ORDERED THAT :

1. The Administrator's appeal is granted in part; and
2. The 30-day suspension of respondent's private pilot certificate shall begin 30 days from the date of service of this order.¹⁴

HALL, Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order. Member VOGT did not concur, and submitted the following dissenting statement.

¹⁴For the purposes of this order, respondent must physically surrender her certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).

Member Vogt's Dissent in Administrator v. Cherry

The only issue in dispute is whether respondent's departure from Silverado Farms was "careless or reckless and endangered the life or property of another". The majority agrees that this issue turns on credibility determinations which are within Judge Mullins' exclusive province, unless made in an arbitrary or capricious manner. They then proceeded to hold that the judge's credibility determinations were "fatally flawed". Without observing the witnesses and hearing their testimony, the majority concludes that the respondent should not be believed while the Administrator's witnesses should be.

In his oral opinion the judge observed that there may have been two flights, although the relevant evidence related to only one. Judge Mullins stated that he was therefore "focusing . . . on the flight in question. I assume it was the first flight. But , whatever flight it was[,] I am going to focus on that flight." Tr. at 204.¹ It is not, as the majority believes, a "fatal flaw" to focus on the flight in question even though the judge viewed favorably his apparent belief that the respondent made a "return trip" to the farm. The issue is after all, what happened on the flight which everyone agrees took place. Having totally obliterated all of Judge Mullins' decision on the basis of this alleged "fatal flaw" the majority then moves into the vacuum which it has created to make its own crucial, credibility determinations.

¹After opening statements and before evidence was taken, Judge Mullins attempted to clarify the number of flights issue, but the Administrator's counsel failed to clarify the issue, referring to a first flight and a second flight. Tr. at 12-13. Moreover, the Administrator's witness, Mr. Davis, implied that there was more than one landing at the farm, testifying about "the first time [the helicopter] touched down. . . ." Tr. at 22.

Respondent testified that she informed Mr. Davis that she wished to depart but was concerned about the horses, and that he informed her that the horses had been moved. Tr. at 174-75. Accordingly, she testified that she departed only after she had assured herself that the departure would not endanger the horses. The majority totally discredits this testimony finding it unreliable(see f.n. 13), and fully credits Mr. Davis' testimony, having "no skepticism regarding [his] veracity".² On the basis of this total disregard of Judge Mullins' credibility determinations, the majority then concludes that the respondent lacked judgment and care by not investigating the possibility that there were more horses in the area prior to her departure.

There is no basis in this case for the majority's departure from the Board's longstanding and appropriate deference to the credibility determinations of its judges. Indeed, this case illustrates the need for such reliance. At most, if the majority is sufficiently troubled by the misunderstanding of one of the facts by the judge, the case should have been remanded for reconsideration.

²The Administrator's witnesses were as follows. Mr. Davis, who was the son-in-law of the owner of the farm. The horse most severely injured had been at the farm for only four days. It had been given as a gift to the Administrator's third witnesses, Ms. Welch, who worked as a topless entertainer. The Administrator's second witness, Judy Kurtz, happened to be at the farm, and testified that horses were spooked by the landing. This fact is not in dispute. The disputed issue is whether respondent justifiably believed that horses which might be spooked by a helicopter had been moved or were properly secured before she departed. The Administrator's last witness, Mr. Kessinger, was the FAA inspector who investigated the complaint against respondent and brought the charges against her. (continued. . .)

²(. . .continued) Respondent's witnesses were respondent, her husband, and Mr. Dean, who was acquainted with both the owner of the farm and the respondent. He testified that he was witness to a conversation in which the farm owner was adamant that respondent should fly her helicopter to the farm and land where she did.

None of these facts shed light on the majority's decision to credit the administrator's witnesses without skepticism and to find the respondent and her witnesses unreliable.